Supreme Court, U.S.
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No. 91-1052

In The

Supreme Court of the United States

October Term, 1991

BETH ANN GOODWIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO THE OPPOSITION BRIEF FOR THE UNITED STATES

JAMES A. PLAISTED, ESQ.
Counsel of Record
WALDER, SONDAK, BERKELEY & BROGAN, P.A.
5 Becker Farm Road
Roseland, New Jersey 07068
(201) 992-5300

Attorneys for the Petitioner, Beth Ann Goodwin

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Reasons for Granting the Cross-Petition for Certiorari 1

1. This Court Should Grant Review of the Question Whether Our Government Can Compel a Person's Testimony Under Immunity and then Use That Testimony In a Quasi-Criminal Proceeding to Forfeit The Person's Home 1

2. This Court Should Correct the Ruling Below and Hold That an Innocent Homeowner Has the Benefit of the Protection of the Statute of Limitations for Quasi-Criminal Forfeiture Actions Similar to That Available to a Criminal Defendant 6

3. This Court Should Grant Review of The Question Whether Due Process Permits The Seizure of an Innocent Person's Home After Years of Undue Delay 7

4. This Court Should Consider Whether Our Constitutional Prohibition Against Unreasonable Seizures Requires a Hearing Before a Home is Seized and What Standards are Applicable Thereto 8

Conclusion 10

Exhibit A

Exhibit B

TABLE OF AUTHORITIES

Page

CASES

Lancashire Shipping Co. v. Durning, 98 F.2d 751 (2d Cir. 1938), *cert. denied*, 305 U.S. 635 (1938) 7

United States v. Beery, 678 F.2d 856 (10th Cir. 1982) 5

United States v Garrett, 797 F.2d 565 (8th Cir. 1986) 5

United States v. Hampton, 775 F.2d 1479, 1491 (11th Cir. 1985) 5

United States v. Hinton, 543 F.2d 1002, 1010 (2d Cir. 1976), *cert. denied* 429, 429 U.S. 980 (1976)..... 5

United States v. Kastigar, 406 U.S. 441 (1972)..... 3

United States v. North, 920 F.2d 940, 948 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991) 5

United States v. One Dark Bay Horse, 130 F. 240 (D.C.Vt. 1904) 7

United States v. Premises and Real Property at 4492 Livonia Rd., 889 F.2d 1258, 1262-1266 (2d Cir. 1989)..... 9

United States v. Society of Independent Gasoline Marketers of America, 624 F.2d 461, 473-74 (4th Cir. 1979), *cert. denied*, 449 U.S. 1078 (1981)..... 5

United States v. Zielezinski, 740 F.2d 727, 732 (9th Cir. 1984) 5

STATUTES

19 U.S.C. 1621..... 7

21 U.S.C. 881.....2, 6

28 U.S.C. 2462.....6, 7

REASONS FOR GRANTING THE CROSS-PETITION FOR CERTIORARI

1. This Court Should Grant Review of the Question Whether Our Government Can Compel a Person's Testimony Under Immunity and Then Use That Testimony In a Quasi-Criminal Proceeding to Forfeit The Person's Home.

The government attempts to persuade this Court not to review this issue by asserting that the Brenna indictment was obtained independent of Goodwin's testimony, asserting:

> There is no dispute the petitioner's testimony provided no information regarding Brenna's drug transaction.

(Govt. Br. in Opp. at 9) That is absolutely erroneous. The actions of the prosecutors provide irrefutable evidence of the value and usefulness of petitioner's immunized testimony to pursue and prove this indictment. Indeed, immediately after the return of the indictment, the government prosecutor demanded that petitioner be available as a "material witness" for the prosecution and again promised Ms. Goodwin immunity. (See Exhibits A and B attached hereto.)[1] It is therefore clear that petitioner's immunized testimony was sufficiently important to the government so that it intended to reproduce that testimony firsthand at the trial. (See Exhibits A and B attached hereto.)

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[1] For the convenience of the Court, we have reproduced the pertinent correspondence from the government's counsel as Exhibits A and B to this Reply Memorandum.

Contrary to the government's assertions, there was no record from which any factual determination could have been made that the indictment of Brenna was independently obtained. The indictment was returned in early April in the district of Florida within a month of the district court's decision on the motions below. That indictment was filed with the district court by the government to serve as basis for the government's motion to stay the proceedings pursuant to 21 U.S.C. 881(i) (33a-34a).[2] No factual affidavits nor even a proffer was made by the government at any time thereafter to suggest that the indictment was obtained independent of Goodwin's testimony. No hearing occurred at which the government sought to establish that the indictment was independently obtained.

The government suggests that petitioner is required to demonstrate that her testimony was used to secure or further the criminal investigation that produced the indictment. (Govt. Br. in Opp. at 8-9) But this turns the *Kastigar* doctrine on its head. Petitioner was not privy to the precise evidence utilized. In fact, the Federal Criminal Rules (*i.e.*, Fed. R. Crim. P. 6) preclude her from learning what evidence the government used to obtain the indictment. It is therefore the government's burden to prove that the indictment was not procured on the basis of immunized testimony or the fruits thereof; not the other

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[2] The Appendix to the government's petition will be referenced as (App. [pages]). The Appendix of Cross-Petitioner Goodwin will be referenced as (C.P. App., *infra*, [pages]).

way around. *See United States v. Kastigar,* 406 U.S. 441 (1972)[3] and the cases cited at p. 5 *infra.*

Neither the district court nor the Third Circuit have found as a fact that the indictment was obtained independent of petitioner's testimony or the fruits thereof. The district court *sua sponte* reasoned that Ms. Goodwin's immunized testimony did not admit complicity in, or direct knowledge of, a drug offense and therefore the indictment should be considered independent thereof. But the district court's analysis cannot be reconciled with the importance of petitioner's testimony to the government as demonstrated by Exhibits A and B. The indictment was returned a full year after the seizure and more than a year and a half after petitioner's testimony. Her immunized testimony exceeded 100 transcript pages. The testimony reviewed her knowledge of the relationship between Joseph Brenna and other co-defendants. It explored Ms. Goodwin's knowledge of the relations between potential defendants, witnesses, their boat businesses, and hotel businesses in the Caribbean. The questioning explored Brenna's trips out of the country and elsewhere and the ownership of boats, some of which the government now claims were involved in drug transactions after 1985. All of this could be relevant to the

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[3] The government also claims that the only contention that furthered the prosecution in the more than 100 pages of immunized testimony was petitioner's admission that she received money from Brenna. This testimony was voluminous and contained many facts. Surely petitioner cannot determine which portions of her immunized testimony were useful to secure the indictment and prosecute Brenna and which portions the government intended to use at trial.

indictment. Indeed, the government representative who took the testimony and used it to draft the forfeiture Complaint stated that he provided the immunized statement to the prosecuting authorities in Florida. (App. 10a; C.P. App. 24a)

The fact that an indictment of Brenna was returned a year after the seizure is legally irrelevant to the issue presented even if the indictment was independently obtained. That subsequent event is not an independent justification for the seizure a year prior thereto. The use of immunized testimony to draft the Complaint to forfeit the home cannot be cleansed a year later by the return of an indictment. Simply put, the quasi-criminal forfeiture Complaint was prepared with tainted evidence and should be dismissed.[4]

If a criminal indictment containing a forfeiture provision was procured by utilizing immunized testimony of the defendant, six out of seven circuits would require the dismissal of the pleading. If a quasi-criminal forfeiture Complaint against an innocent owner is based on such immunized testimony, it follows *a fortiori* that such an innocent owner should receive the same benefit and obtain a dismissal of that pleading.

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[4] If petitioner had been charged in an indictment in Florida and her interest in the house sought to be forfeited was based upon her immunized testimony, she would have moved to have the indictment and criminal forfeiture dismissed and that motion would in all likelihood have been granted. See authorities at p. 5, *infra*. Her motion, denied by the district court below, to dismiss the quasi-criminal forfeiture complaint on the same ground should have been granted.

If an indictment is gained with immunized testimony, the government should not be permitted to cleanse that indictment after the fact by claiming that later procured evidence was independently obtained and would have warranted the same criminal indictment. Six circuits have held that an indictment obtained with such testimony should be dismissed. *See United States v. North*, 920 F.2d 940, 948 (D.C. Cir. 1990), *cert. denied*, 111 S.Ct. 2235 (1991); *United States v. Hampton*, 775 F.2d 1479, 1491 (11th Cir. 1985); *United States v. Hinton*, 543 F.2d 1002, 1010 (2d Cir. 1976), *cert. denied*, 429 U.S. 980 (1976); *United States v. Garrett*, 797 F.2d 656 (8th Cir. 1986); *United States v. Zielezinski*, 740 F.2d 727, 732 (9th Cir. 1984); *United States v. Beery*, 678 F.2d 856 (10th Cir. 1982). Only the Fourth Circuit permits an indictment obtained in part through the use of immunized testimony to survive a dismissal motion. *See United States v. Society of Independent Gasoline Marketers of America*, 624 F.2d 461, 473-74 (4th Cir. 1979), *cert. denied*, 449 U.S. 1078 (1981).

If a criminal defendant is entitled to such protection, this Court should likewise make it clear that similar protection is offered to an innocent homeowner defending her house from forfeiture in a quasi-criminal action. The government provides no authority to suggest that this issue is unworthy of review to resolve these differences in the circuits as to the appropriate remedy when testimony is compelled and then used directly in criminal and quasi-criminal cases against the immunized citizens.[5] If, as the cases demonstrate, the government intends to

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[5] The other related conflicting holdings cited in our cross-petition at p. 10 were not addressed by the government but also compel review of the issue.

pursue its criminal forfeiture program with such vigor, this Court should provide guidance to resolve the conflict among the Circuits as to what use may be made of immunized testimony to pursue such forfeitures, whether the forfeitures are criminal or quasi-criminal.

2. This Court Should Correct The Ruling Below And Hold That an Innocent Homeowner Has the Benefit of The Protection of The Statute of Limitations For Quasi-Criminal Forfeiture Actions Similar to That Available to a Criminal Defendant.

The government concedes that there are no known decisions construing the appropriate statute of limitations for actions brought pursuant to 21 U.S.C. 881(a) except the decision below. Moreover, the government proffers no justification for the anomaly that now exists where Brenna, the alleged criminal, is protected by a five-year statute of limitations for a criminal forfeiture of his alleged interest in this same house and the government contends that the actual innocent owner, Goodwin, could be subject to a forfeiture for a substantially longer period of time.

This anomaly can be resolved by a common sense interpretation of the actual wording of 21 U.S.C. 881 which does not by its specific terms incorporate the expensive customs statute of limitations but rather leaves this forfeiture action subject to the five-year specific statute of limitations applicable to all federal forfeitures, *i.e.*, 28 U.S.C. 2462.

In order to persuade this court not to accept this issue for review, the government argues that 28 U.S.C. 2462 would be tolled during the time period that the

government did not know of the alleged basis for the forfeiture, and therefore, there is no difference in the application of these statutes. (Govt. Br. in Opp. at 11 n.8) However, no reported decision has so held. In fact, all reported decisions reflect that there is no such tolling of 28 U.S.C. 2462. *See, e.g., United States v. One Dark Bay Horse,* 130 F. 240 (D.C.Vt. 1904); *Lancashire Shipping Co. v. Durning,* 98 F.2d 751 (2d Cir. 1938), *cert. denied,* 305 U.S. 635 (1938). The only authority cited as support for the government's contention that 28 U.S.C. 2462 would be tolled when the government is unaware of its forfeiture action is a statement in a legal treatise referring to the general rule for the accrual of federal civil causes of action. (Govt. Br. in Opp. at 11 n.8). That statement in the treatise is inapposite and based solely on the application of cases and statutes which are not forfeiture cases and statutes.

Moreover, 28 U.S.C. 2462 contains no provision by which it is tolled. In contrast, 19 U.S.C. 1621 contains just such a tolling provision by its explicit terms. Since the government's interpretation as to tolling of 28 U.S.C. 2462 conflicts both with the wording of the statute and the reported decisions, it should be rejected. This Court should grant review of this issue to correct a grossly erroneous decision regarding forfeiture that will doubtless be cited by the government in other forfeiture proceedings.

3. This Court Should Grant Review of The Question Whether Due Process Permits The Seizure of an Innocent Persons' Home After Years of Undue Delay.

The government argues (Govt. Br. in Opp. at 12) that the Due Process Clause does not apply to any delay in a

forfeiture proceeding which occurs before the formal seizure. Thus, the government contends that a homeowner like petitioner Goodwin will be forever subject to having her home seized without limitation by the Due Process Clause so long as the seizure is promptly followed by a forfeiture action. If the government had not come into the possession of evidence indicating that Brenna's funds were allegedly traceable to drug activity until the year 2020, Ms. Goodwin, according to the government, still would have no protection by virtue of the Due Process Clause or the statute of limitations. According to the government, neither the Due Process Clause of our Constitution nor the statute of limitations will protect her from any such delay despite her conceded innocence of any relevant criminal activity. We submit that the Due Process Clause cannot countenance such a result.

4. This Court Should Consider Whether Our Constitutional Prohibition Against Unreasonable Seizures Requires a Hearing Before a Home is Seized and What Standards are Applicable Thereto.

The government concedes there is a two-to-one split in authority among the circuits as to whether the Fourth Amendment to our Constitution requires an evidentiary hearing before a home is seized in a forfeiture action, and if so, the nature of such hearing. (Govt. Br. in Opp. at 14) That split warrants resolution by this Court.

This question was the first issue certified by the district court. (App. 44a-45a) The district court considered that issue in this context and determined that the facts in opposition to the summary judgment motion were adequate to discharge the government's burden.

(App. 18a to 25a, particularly beginning at 20a) The fact that the source of the funds for the purchase was cash, which the claimant contends may have come from Brenna's boat business, is not an adequate basis for the seizure alone. The only other basis for the seizure is the alleged double hearsay report from an unreliable informant (Mazocca). The deposition of DEA agent Giacobbe, punctuated by scores of government instructions not to answer, concluded with the revelation that neither the agent, Murphy, nor Mazocca had any basis for believing and did not know whether the funds traceable to the house purchase came from any illegal transaction. (*e.g.*, C.P. App. at 31a-36a)

The government urges this Court not to consider this issue on the grounds it was not specifically certified; however, the district court certified the question whether a pre-seizure hearing is constitutionally mandated and considered, within that context, what the standard and evidence to fulfill the government's obligation would be. The Second Circuit in *United States v. Premises and Real Property at 4492 Livonia Rd.*, 889 F.2d 1258, 1262-1266 (2d Cir. 1989) did the same when it concluded that the Constitution mandated a pre-seizure hearing.

Once again the government seeks to persuade this Court to ignore the issue by arguing that the indictment returned a full year after the seizure somehow ratifies the improper seizure. For the reasons set forth above at pp. 1-4, *supra*, that claim should be rejected. Moreover, the indictment contains no facts or specific allegations that Brenna received any money prior to 1985 from any alleged drug transactions.

In this case, if the defendant had a pre-seizure hearing, the lack of probable cause would have been evident. The government never produced any reliable evidence in this case other than the fact that Brenna had provided cash in 1982 to Murphy, who later transferred some money traceable thereto to Goodwin. Since there was ample evidence known to the government that Brenna had an off-shore boat business, the mere fact that he had liquid assets should not justify such a forfeiture.

The government continues to seize homes throughout the country without providing pre-seizure hearings. This practice warrants a resolution of the issue of whether our Constitution sanctions such a practice and what showing should be made at that hearing, if it is required.

We ask this Court, as the district court similarly requested by its certification, to resolve the issue of whether a citizen's home may be seized only after an evidentiary hearing, and, if so, what is the proper standard the government must meet.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari with respect to the four questions presented in the cross-petition.

Respectfully submitted,

WALDER, SONDAK, BERKELEY & BROGAN, P.A.
Attorneys for Petitioner, Beth Ann Goodwin

JAMES A. PLAISTED
Counsel of Record

EXHIBIT A

UNITED STATES DEPARTMENT OF JUSTICE

[SEAL]
IN REPLY
PLEASE
REFER TO
INITIALS AND
NUMBER

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF FLORIDA
299 EAST BROWARD BOULEVARD
FT. LAUDERDALE, FLORIDA 33301
Suite #309E
(305) 527-7392

April 13, 1990

Mr. James Plaisted
5 Becker Farm Road
Roseland, New Jersey 07068

Re: Beth Ann Goodwin

Dear Mr. Plaisted:

Please be advised that Beth Ann Goodwin is a material witness on behalf of the United States government in the case of United States v. Maiorino, *et al.*, Case No. 90-6055-CR-GONZALEZ. No date for trial has been set at the present time. Please contact the undersigned government counsel to discuss Ms. Goodwin's availability.

Thank you for your anticipated cooperation.

Very truly yours,

DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

BY: /s/ Paul F. Schwartz
PAUL F. SCHWARTZ
Assistant United States Attorney

EXHIBIT B

UNITED STATES DEPARTMENT OF JUSTICE

[SEAL]
IN REPLY
PLEASE
REFER TO
INITIALS AND
NUMBER

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF FLORIDA
299 EAST BROWARD BOULEVARD
FT. LAUDERDALE, FLORIDA 33301
Suite #309E
(305) 527-7392
April 19, 1990

Mr. James Plaisted
5 Becker Farm Road
Roseland, New Jersey 07068

Re: Beth Ann Shurack

Dear Mr. Plaisted:

Pursuant to our telephone conversation of April 17, 1990, please be advised that your client, Beth Ann Shurack/Goodwin has been granted immunity, pursuant to Title 18, United States Code, Sections 6002-6003. Accordingly, no testimony or other information resulting from Ms. Goodwin's deposition on May 5, 1988 (or any information directly or indirectly derived from such testimony or other information) may be used against her in any criminal case, except a prosecution for perjury, or for giving a false statement.

Please be further advised that the United States considers Ms. Goodwin to be a material witness in the case of *United States v. Joseph C. Maiorino, et al.*, and therefore I would request that she be made available for trial preparation.

Thank you for you [sic] anticipated assistance in this matter.

Very truly yours,
DEXTER W. LEHTINEN
UNITED STATES ATTORNEY
BY: /s/ Paul F. Schwartz
PAUL F. SCHWARTZ
Assistant United States Attorney